No. 11,118

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. BUELL,

Appellant,

vs.

SIMON NEWMAN COMPANY (a California corporation),

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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I.

INSUFFICIENCY OF GROUNDS URGED FOR REVERSAL.

(1) The record as printed, (2) the statement of the case made by appellant, and (3) the specification of errors made by appellant, are insufficient to meet the decision of the District Court. The record as printed fails to set forth the plan of composition which forms one of the main grounds of the decision of the Court. The statement of the case fails to set forth the provision of the plan of composition on which the Court based its decision. The specification of errors only specifies the failure to strike the release (which is not argued) and the finding that the release did release the obligation to pay rent, and

entirely ignores the findings that there was under the facts no obligation of this land to pay any rent or any sum in excess of the purchase price designated in the plan of composition. Appellant's argument, therefore, not having covered matters decided by the District Court amply sufficient to sustain the judgment, the Court is not required to examine the matter further.

II.

THE FACTS.

The facts are that under date of December 6, 1943, an agreement was entered into by W. E. Buell, representing the bondholders of Montague Water Conservation District, and Montague Water Conservation District. Simon Newman Company, the appellee here, was not a party to that agreement. That agreement set forth the amount that was to be paid on the bonded indebtedness and the amount that was to be paid by each parcel of land, and the particular land involved in this case was allotted the sum of $32,420.85. (T. 28.) The agreement provided that the amount might be paid either in cash or by means of a note and deed of trust, and paragraph IX of the agreement provided that "Whenever land has been released from obligation pursuant to paragraphs I and II hereof, the said Trustee, shall make, execute and deliver to the owner of such land a release substantially in the form of Exhibit "C" hereto attached, which release shall be acknowledged so that it may be recorded in the rec-

ords of the County of Siskiyou, State of California." However, the agreement contemplated and recognized that certain of the land within the District might be owned by the District, having been acquired for non-payment of District assessments, and therefore paragraph III of the agreement provided that "upon the expiration of ninety days from the date of final confirmation of this contract by the United States District Court, as provided in paragraph III hereof, the District agrees to execute and deliver to the said Buell a deed to all non-operative property *then* standing in the name of the District". In connection with this type of land the agreement, in paragraph VIII, provided:

> "All income from rents and royalties accruing after December 31, 1943, upon lands now owned by the District shall belong to the bondholders, provided that if this contract shall not be approved by the United States District Court for the Northern District of California, such rentals, royalties and leases shall belong to the District. Also provided however that from such rental there shall be deducted and retained by the District an amount equal to the maintenance and operation assessments that would have been levied upon the lands from which such rental is derived had the lands been in private ownership."

It will be noted that there was no assignment of such rent to Buell. This particular land at the time of the confirmation of the plan belonged to the District, having been acquired for non-payment of District taxes, and on the 1st day of January, 1944, the Dis-

trict leased the land to Simon Newman Company. This lease provided for no cash rental, but provided for the delivery to the District, as lessor, of a certain proportion of the crop harvested. At the time of the lease there was a crop of grain planted on the property. This lease was entered into between the parties with full knowledge of the plan regarding the bonds, and was made subject thereto by the following provisions:

> "It is further agreed and understood that this lease and agreement is executed by the lessor and accepted by the lessee in full understanding of, and subject to all the rights, privileges, restrictions, duties and obligations of the lessor under the terms and conditions of a certain plan of Municipal Debt Readjustment, and petition for confirmation now on file in the United States District Court, for the Northern District of California, Northern Division and numbered 10503 therein. The lessor shall not be accountable for, nor liable to the lessee for any act on its part done in effecting or carrying out the terms and provisions of said plan nor of any act required of it to be done by order of Court in said proceedings."

Under this plan the District took the position that it was entitled to sell any land in the District owned by it, provided the purchaser paid the amount that had been allotted against that land, at any time within 90 days after the confirmation of the plan, and therefore, within 90 days after the confirmation of the plan, and on May 27, 1944, the District sold and conveyed this particular property to Simon Newman Company

for the amount allotted against this land, to-wit, the sum of $32,420.85, and this sum was paid to and accepted by W. E. Buell, as trustee for the bondholders, from Simon Newman Company, pursuant to the provisions of the contract dated December 6, 1943 (see certificate of release attached to answer of defendant). (T. 11-14.) The provision of the contract for such release obviously referred to the provisions which permitted a land owner to have his land released from further obligations to the bondholders by paying the specified sum, and it obviously had no reference to the provisions of the contract regarding lands which within 90 days after the confirmation of the plan were to be conveyed to the District together with rentals accruing after December 31, 1943, less District assessments.

At the time of this sale the grain crop was only about 6 inches high, and no crops of any kind had been taken off the land. At a later date the crop was matured and harvested by defendant and one-quarter of the crop as matured and harvested was of the value of $3327.00.

III.

STATEMENT OF APPELLEE'S CONTENTIONS.

1. The provision for the right to rents and royalties has no application to lands with respect to which the owners paid the allotted amount, but only to lands which within 90 days after confirmation of the plan

were conveyed by the District to the trustee for the bondholders. This land was not so conveyed.

2. The bondholders, by accepting payment and releasing the land pursuant to the terms of the plan, recognized the right of the District to sell the land within the 90-day period and the right of the purchaser of the land to pay the allotted amount, and completely ratified the act of the District in so selling the land.

3. Even if the provision as to rents and royalties applied to such lands, the right thereto, by the sale and conveyance of the land by the lessor to the lessee, was merged in the title which appellee acquired, and never accrued within the meaning of the plan.

4. Even if the provision regarding rents and royalties applied to land which paid the allotted amount, the plan did not amount to an assignment of such rental and appellant could not in this action sue therefor.

5. The lease did not provide for any cash rental, but only for a share of the crop, and if appellant has any right to the crop he has no right to recover cash, but could only recover his share of the crop itself, there being no allegation that the crop had in any way been converted by Simon Newman Company.

6. There is no merit in the objection to the release made by the appellant, as it is evidence of the receipt by Buell of the money and the admission by him that it was paid pursuant to the terms of the contract, and therefore constitutes a full ratification of the construc-

tion of the contract given by the District and the action of the District thereunder.

(All of these contentions were upheld by the District Court except Nos. 4 and 5 which were not passed upon.)

IV.

ARGUMENT.

We think that a reading of the plan will convince the Court that the plan contained entirely different provisions with regard to lands which were required to be conveyed by the District within 90 days after the confirmation of the plan, and lands which were not so conveyed but were to be released upon payment of the allotted amount. This seems to be made particularly clear by subdivision (d) of paragraph III, which provides that "upon the expiration of ninety days from the date of final confirmation of this contract by the United States District Court, as provided in paragraph III hereof, the District agrees to execute and deliver to the said Buell a deed to all non-operative property THEN *standing in the name of the District*". Obviously, there was no obligation of the District to convey to Buell land which *at that time* was not standing in the name of the District but had been conveyed by the District to other persons. It is apparent from the release which Buell gave that the District saw to it that the full amount of the purchase price was actually paid to Buell, and that the purchase price was the full amount

allotted against these lands. If the plan did not authorize the sale of the land by the District within 90 days, or if there was any ambiguity in the contract in that regard, the action of Buell in certifying that the payment was made pursuant to the terms of the contract was a complete ratification by him of the action of the District, and constitutes a contemporaneous construction by the parties of the meaning of the agreement. While it is true that paragraph VIII standing alone provides that "All income from rents and royalities accruing after December 31, 1943 upon lands *now* owned by the District shall belong to the bondholders", it is clear from the entire agreement that this had reference to lands that were within the 90-day period conveyed to Buell. No reason can be assigned why lands of this type, on which the bondholders received the full allotted amount, should also contribute rental, while other lands in private ownership, paying the allotted amount, should have no such liability.

Moreover, if the contract is to be constructed as permitting a sale of the land within the 90-day period and upon payment of the allotted amount, the parties must be deemed to have contracted with reference to the legal effect of such transaction. The legal effect of the conveyance was obviously to merge in the title acquired by Simon Newman Company any claim of the District to rentals which would thereafter accrue.

10 *Cal. Jur.*, Estates, Sec. 10, p. 606;
Jameson v. Hayward, 106 Cal. 682;

Erving v. Jas. H. Goodman Bank, 171 Cal. 559;

Landis Brothers Co. v. Lawrence, 104 Cal. App. 499;

Ito v. Schiller, 213 Cal. 632.

If the right of the District to those rentals merged in the title which Simon Newman Company acquired, the District could certainly not claim the same from Simon Newman Company when they accrued, and it is perfectly clear that paragraph VIII of the agreement does not amount to an assignment of those rentals by the District to Buell. Reading the entire provision, it only amounts to an indication that rents accruing to the District, after deducting from them an amount equal to the maintenance and operation assessments, would belong to Buell. There is no evidence here as to the amount of such assessments, and it is impossible to determine the amount of those rentals to which Buell would become entitled. Moreover, we submit that the contract did not obligate the District to turn over to Buell rentals to which the District never became entitled. If a rental had been due and payable to the District prior to the time it sold the land, the right thereto would have accrued and would not be merged in the deed, but this rental could not accrue under the terms of the lease until the crop was grown and harvested. We submit that the word "accrue" evidently referred to some rent or royalty that would actually accrue to the District. It certainly had not accrued when

the crop was only 6 inches high and had neither been matured nor harvested.

If the District had assigned to Buell all rents to which the District might during the life of the lease become entitled, we would have an entirely different situation. But here, in the first place, there was no assignment of any kind, but only an indication of some interest, to be determined upon an accounting, in rentals which should actually accrue to the District. This rental never accrued to the District, and the agreed statement of facts provides that "Montague Water Conservation District makes no claim against Simon Newman Company for any rent under said lease". (T. 16-17.) But even if there had been an assignment of the rent, this would not have prevented a merger, in view of the rule laid down in *Erving v. Jas. H. Goodman Bank,* 171 Cal. 559. In that case there was an assignment of the rent, and it was contended that this prevented the operation of the doctrine of merger, but the Court held that in taking the assignment the assignee was aware of a provision in the lease by which the lessee might become the purchaser of the property. Under these circumstances it was held that where he did become such purchaser the doctrine of merger would prevail against the assignee. So here, the same instrument which gives the appellant some right in the rent, when properly construed, authorizes the District to sell the land, and it having sold it and got it released, the doctrine of merger applied.

Moreover, we submit that the entire transaction shows that the appellant released not only the land, but Simon Newman Company as the owner of the land, from any further obligation to the bondholders. It is true that the certificate of release "does by these presents forever release the hereinafter described real property * * * from liability for the payment of the present outstanding bonds and interest thereon of the Montague Water Conservation District". It does not in so many words release Simon Newman Company from any such liability, but it does recite the payment by Simon Newman Company of the sum of $32,420.85 and it recites that this was paid pursuant to the provisions of the plan. The plan certainly did not contemplate that the land would be released but that the owner of the land would not. In other words, the receipt of the money and the giving of the release was all on the supposition that this particular land was controlled by paragraphs I and II of the plan, and not by paragraphs III and VIII respecting lands which were to be conveyed by the District to Buell.

Counsel for appellant, in his brief, makes distinctions between obligations growing out of privity of contract, but while Simon Newman Company took subject to the plan, it was not a party thereto nor did it agree to pay any rents or royalties to the plaintiff. Counsel also refers to the severance of these rents from the land, but as we have pointed out, they never were severed because there never was any assignment by the District of the rents accruing under this contract. Any obligation for rental was an obligation to the District, and that obligation was merged

in the title which Simon Newman Company received from the District, with the complete consent and ratification of the appellant.

Obviously the provision of paragraph VIII set forth on page 3 hereof cannot be literally followed. That paragraph provides that all rents accruing after December 31, 1943, on all lands owned by the District, shall belong to the bondholders. If this is made to apply to lands which at the time of the agreement belonged to the District, but which by subsequent action of both parties were conveyed away, then the purchaser of those lands would be *perpetually* bound to pay all the rents accruing from any source from the land to the bondholders. In other words, there is no limit of time. As applied to land conveyed by the District within 90 days this was entirely logical, because no one after such a conveyance would be interested in rents thereafter accruing except the bondholders, as the owners of the land. But to construe this contract so that the bondholders would receive the allotted payment of $32,420.85 and also be entitled to the perpetual right to the rents arising from the lands would be totally unreasonable, and such a contract should not and will not be construed so as to make it unreasonable, nor will it be construed contrary to the actions of both parties thereunder.

The construction of the plan of composition and of the release made by the trial Court was not unreasonable and will not be disturbed on appeal.

Kautz v. Zurich General Ins. Co., 212 Cal. 576, 582.

V.

CONCLUSION.

This case is a test case, as the District sold within the 90-day period a large amount of land, and if appellant recovers in this case he will make a like claim against all other purchasers. It must be obvious to the Court that the District, in claiming the right under this agreement to sell this land, was influenced largely by a desire to get the land back into private ownership, and that any doubt as to its right to do so cannot now be raised by the appellant. It must be further obvious to the Court that the bondholders were entirely satisfied if they received one of two things: (1) the allotted payment, or (2) the land itself plus any rents that might accrue after December 31, 1943. The appellant has no right under the agreement to obtain both. In other words, he could not get the allotted amount and still claim the land also. No more can he claim the incidental rent arising out of the land after he has received the allotted amount.

We respectfully submit that the judgment should be affirmed.

Dated, San Francisco, California,
November 14, 1945.

Respectfully submitted,

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